SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

EDYTHE STERLING HAMMOND,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

There was no opinion in the Municipal Court. The opinion of the Court of Appeals (R. 113-115) is reported in 131 F. (2d) 351. The jurisdiction of this Court, the statutes involved, the statement of the case, and all other preliminary matters have been set forth in the foregoing petition.

Summary of Argument.

POINT I.

The Municipal Court of the District of Columbia is an inferior tribunal and not in any accepted sense a "court of the United States", and hence expert testimony as to foreign law is required to be taken by the Municipal Court.

POINT II.

The Court of Appeals plainly misapplied the law of New York; under that law, judgment for the petitioner is required in the circumstances disclosed by the record.

POINT III.

Various other errors committed by the lower courts herein call for the exercise of the supervisory power of this Court in the circumstances of this case.

ARGUMENT.

POINT I.

The Municipal Court of the District of Columbia is an inferior tribunal and not in any accepted sense a "court of the United States" and hence expert testimony as to foreign law is required to be taken by the Municipal Court.

1. *The state of the record.*

Throughout the trial, petitioner constantly pressed upon the Municipal Court expert testimony as to the law of New York upon all the material points having to do with the separation agreement (R. 32, 47-48, 54). Exceptions were saved to the refusal of the Municipal Court to permit petitioner's expert testimony on the law of New York (R. 48, 54). This point was pressed again upon the motion for new trial (R. 94, Item 4). All parties and both courts below are unanimous in their agreement that this case is governed solely by the law of New York (R. 90, Finding 12; R. 114) ("under the New York law which governs this agreement").

This question was argued out both orally and in the briefs before the Municipal Court and admittedly under the authorities cited below the expert testimony had to be admitted in evidence unless the Municipal Court of the District of Columbia was a "court of the United States." The

Municipal Court ruled that it was such a court and hence excluded all expert testimony on the law of New York. This point was duly assigned as error in the Court of Appeals. On appeal to the Court of Appeals, both in the briefs for leave to appeal and in the argument on the merits after the Court of Appeals had allowed the appeal (R. 18), petitioner constantly pressed his argument that the Municipal Court of the District of Columbia was not a court of the United States in such a sense as to permit the exclusion of expert testimony as to foreign laws. This was fully argued orally before the Court of Appeals and nevertheless by its judgment (R. 116) the Court of Appeals affirmed all the rulings of the Municipal Court to the effect that said Municipal Court is a court of the United States and hence should exclude all expert testimony as to foreign law.

This point was not mentioned in the opinion of the Court of Appeals despite the argument devoted to it, but it was called squarely to the court's attention again in the petition for rehearing (R. 126-131) and the overruling without opinion of that petition (R. 138) necessarily again determined that the Municipal Court of the District of Columbia was a court of the United States and could not receive expert testimony as to the laws of any state in the United States. Hence, this record squarely presents this question for consideration by this Court upon this petition for a writ of certiorari. *Cf. Honeyman* v. *Hanan*, 300 U. S. 14. See R. 130.

2. *The admissibility of expert testimony as to foreign law.*

The rules here are simple because they have been many times expounded by this Court. In *Hanley* v. *Donoghue*, 116 U. S. 1, 4, this Court laid down the rule that in all cases *in State or local courts*, foreign law must be proved as a fact, saying:

> "No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. *Talbot* v. *Seeman*, 1 Cranch 1, 38; *Church* v. *Hubbart*, 2 Cranch 187, 236; *Strother* v. *Lucas*, 6 Pet. 763, 768; *Dainese* v. *Hale*, 91 U. S. 13, 20. It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws of another State."

This Court has many times since applied this same rule. *Huntington* v. *Attrill*, 146 U. S. 657, 678; *Lloyd* v. *Matthews*, 155 U. S. 222, 227; *Chicago R. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 623; *Gasquet* v. *Lapeyre*, 242 U. S. 367, 371; *Allen* v. *Alleghany Co.*, 196 U. S. 458, 464. It is a rule which is said to be universal in application (See *Wigmore on Evidence* (3rd ed., 1940) Section 1953; Lord Brougham in the *Sussex Peerage* case, 11 C. L. & F. 115). It is a rule applied without dissent in the various State courts and no cases to the contrary are known. A representative collection of State cases is included in the footnote below.[4] It is to be noted that these State cases include a square ruling upon this point by the highest court of New York.

There is only one exception which has ever been recognized to the above rule. That was laid down by this Court in *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751,

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[4] *Hanna* v. *Lichtenheim*, 225 N. Y. 579, 582, 122 N. E. 627; *Harmon* v. *Peats Co.*, 216 N. Y. App. Div. 375, 214 N. Y. Suppl. 359. *Electro-Tint Co.* v. *Vatt Co.*, 130 N. Y. App. Div. 567, 115 N. Y. Supp. 38. *Saint Louis R. R. Co.* v. *Haist*, 71 Ark. 258, 72 S. W. 894. *Fish* v. *Smith*, 73 Conn. 377, 388, 47 Atlantic 715; *Miller* v. *Aldredge*, 202 Mass. 109, 88 N. E. 442; *Norman* v. *Penn. Fire Ins. Co.*, 237 Mo. 576, 582, 141 S. W. 619; *N. Y. Life Ins. Co.* v. *Orlapp*, 25 Tex. Civ. App. 288, 61 S. W. 339; *Sammis* v. *Whiteman*, 31 Fla. 10, 30, 12 So. 532; *Chattanooga R. R. Co.* v. *Jackson*, 86 Ga. 676, 681-682, 13 S. E. 108, 110; *Craven* v. *Bates*, 96 Ga. 78, 80, 23 S. E. 203.

and a line of cases following that decision in the lower Federal courts (*e. g., Andrus* v. *Peoples B. L. & S. Assn.*, 94 Fed. 575; *Crory, McFawn & Co.* v. *Hagarty, Conroy & Co., Inc.*, 27 F. Supp. 93, at 95, affirmed 109 Fed. (2nd) 443). This exception is that in "courts of the United States" the law of the several states of the union are not foreign laws which must be proved as facts but are laws of various harmonious units of the domestic whole which are taken judicial notice of by such courts. We think it is clear from the context of the rule as announced in the *Francklyn* case and the decisions in the various cases that have followed it that the rule is limited to *federal courts* of the United States acting in their federal capacity.

It is apparent that the reasoning behind this salutary rule is in no wise related to the municipal or other inferior courts of the District of Columbia. These are strictly local courts whose origin and history are discussed in the section next following. Their jurisdiction is limited solely to a *limited* number of suits involving a limited amount of money (formerly less than $1,000, now less than $3,000) against local residents of the District of Columbia.

Admittedly if this suit had been instituted in the Supreme Court of the State of New York, or in the Common Pleas Court of Ohio, or in the Superior Court of Connecticut, all State courts of unlimited original jurisdiction, the expert testimony here offered to the Municipal Court would have had to be admitted under the authorities cited above. Admittedly the testimony would not have had to be admitted in the same suit brought in a district court of the United States, sitting in one of these States under the rule announced in the *Francklyn* case. The question becomes a simple one: Is the Municipal Court of the District of Columbia, an inferior tribunal of severely limited jurisdiction, governed by the rules applicable to the various State courts of original unlimited jurisdiction, or by the rules pertain-

ing to the District Courts of the United States, sitting in their federal capacity? We believe the decisions of this Court clearly point out that the Municipal Court of the District of Columbia is to be governed by the same rules as applicable to all State courts and is therefore required to admit expert testimony as to foreign law.

We believe that no better exposition of the meaning of the phrase "courts of the United States," as applied in the above rule may be found than in *United States* v. *Mills*, 11 App. D. C. 500, 505, 506-507, holding the Police Court of the District of Columbia not to be a "court of the United States":

> "* * * While in the fourteenth section, that now under consideration, the express language used is 'any court of the United States'. Nor is there any good reason for the restriction of this expression to the so-called general system of the courts of the United States, assumed to be confined to the Federal courts in the several States of the Union. We must regard the Federal courts in the District of Columbia as being as much an integral part of the Federal judicial system as are the Federal courts in the States; for the jurisdiction of the Federal Government over the District of Columbia is as explicitly ordained by the Constitution as is any other grant of power to the Federal Union; and is inalienable."
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> "But it does not necessarily follow from this that the expression—'any court of the United States'—used by Congress in Section 1042 of the Revised Statutes, was intended, or should be construed, to include such a tribunal as the Police Court of the District of Columbia. That court is undoubtedly in one sense a court of the United States, as is even the court of a justice of peace in this District, or a court martial, or any other tribunal established by Congress for temporary or special circumstances; and it does not make the Police Court any less a court of the United States to call it a legislative court; for the legislative power can

establish no court, either here or elsewhere, which is not authorized by the Constitution. But the fact that the Police Court is a court of the United States, created by the Congress of the United States under the authority of the Constitution of the United States, does not necessarily make applicable to it all laws enacted for courts of the United States.

"It is one of the settled rules for the construction of statutes; that general words in a statute may be restricted in order to give effect to the legislative purpose. See Potter's Dwarris on Statutes, p. 164; Sedgwick on Statutory and Constitutional Law, Ch. 6; *Reiche* v. *Smythe*, 13 Wall. 162. Now it requires no elaboration of argument or citation of authorities to show that when there is mention, either in the Constitution or in the statute law, of the courts of the United States, the courts thereby meant are those of general jurisdiction—not temporary, transitional, or sporadic courts; or courts of inferior and limited jurisdiction, specially organized to deal in a summary way with petty matters, either civil or criminal, outside of the usual course and scope of the common law. Of the latter character, undoubtedly, is the Police Court of the District of Columbia, although some common law jurisdiction has now been conferred upon it, and it has been authorized to proceed in divers cases in accordance with common law methods. Like the courts of the justices of the peace, which it was intended in criminal matters to supersede, its purpose was to take the place of the county courts or other courts of minor jurisdiction in England, which were never regarded as being within the general judicial system of that country, and the successors of which for the District of Columbia were certainly never contemplated by the framers of the Federal Constitution as coming within the scope of the provisions which they established for a Federal judicial system. The Police Court of the District of Columbia, therefore, although a court of the United States, is not a court of the United States in the sense of the Federal Constitution, and there is no reason for giving to the same expression in a statute

a broader meaning than is given to it in the Constitution. In fact, when there is mention of the courts of the United States in any statute, we may conclusively assume that only the courts of general jurisdiction intended by the Constitution are meant, unless there is special reason to be deduced from the context of the statute for giving to the expression a different meaning."

3. *The Origin and History of the Municipal Court of the District of Columbia.*

This Court has already fully considered the origin and early history of the Municipal Court of the District of Columbia in *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 15-18, 28 *et seq.,* 30-36, 41-43. The references in that case bring the history of the Municipal Court (then termed the Justice of the Peace Court of the District of Columbia) from its earliest English origins in the *courts leet* of the manor in feudal England through their adoption in this primitive form into Maryland, and thence by Act of Congress into the District of Columbia, when this District was created out of Maryland. In that case, this Court held that a trial by a jury of twelve before a Justice of the Peace (the same type of court that Judge Mattingly held in the instant case without a jury) *and* a review by another jury of the facts on appeal to the Supreme Court of the District of Columbia, as provided by Act of Congress, did not contravene that provision of the 7th Amendment of the Constitution of the United States prohibiting any review of facts once settled by a jury verdict "otherwise than according to the rules of the common law." The reason for this decision was based upon the ground that juries before justices of the peace were neither constitutional nor commonlaw juries. See 174 U. S. 1, at 17-18. This Court went on to say:

"Justices of the peace in the District of Columbia, in the exercise of the jurisdiction conferred upon them

by Congress to try and determine cases, criminal or civil, are doubtless, in some sense, judicial officers. *Wise* v. *Withers*, 3 Cranch 330, 336. *But they are not inferior courts of the United States, for the Constitution requires judges of all such courts to be appointed during good behavior.*[5] Nor are they, in any sense courts of record. They were never considered in Maryland as 'courts of law'. The statutes of Maryland of 1715, c. 12, and of 1763, c. 21 (in Bacon's Laws of Maryland), and of 1791, c. 68 (in 2 Kilty's Laws), defining the civil jurisdiction of justices of the peace, were entitled acts 'for the speedy recovery of small debts out of court.' And Congress has vested in them 'as individual magistrates', the powers and duties which justices of the peace previously had under the laws in force in the District of Columbia. Act of February 27, 1801, c. 15, Sec. 11; 2 Stat. 107; Rev. St. D. C., Sec. 995." (174 U. S., at 17-18.)

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"A justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law; his authority was created and defined by, and rested upon, the acts of Congress only." (174 U. S., at 38.).

It would be a work of superarrogation for counsel to attempt to trace the early history of these courts in the District of Columbia more fully than this Court has already done in *Capital Traction Company* v. *Hof*. The further history of these courts, after the decision of this Court in the *Hof* case, may be briefly traced. It is fully discussed by Mr. Justice Stephens in the United States Court of Appeals for the District of Columbia in *Schwartz* v. *Murphy*, 72 App. D. C. 103, 105 *et seq.*, 112 F. (2d) 24. There Mr.

[5] Emphasis ours throughout unless otherwise noted.

Justice Stephens (who granted leave to appeal in this case, presumably on this same issue, R. 18) pointed out that first there were justices of peace in Maryland which were brought over into the District of Columbia, and that the history then continued as outlined in the *Hof* case. Thereafter, in 1909, Congress (35 Stat. 623, Section 1) provided as follows: "The inferior court known as justices of the peace * * * shall remain as now constituted but shall hereafter be known as the Municipal Court of the District of Columbia." The same Act made this inferior tribunal a court of record. The jurisdictional amount of this Court was limited to $300 as at the time of the *Hof* case, and it was only by later legislation that it was raised to $1,000 which was the situation at the time the instant case was tried in the Municipal Court in July, 1941. Thereafter and on April 1, 1942 (Pub. L. 512, 77th Congress, Ch. 207, 2nd Sess.), the Congress changed and expanded the setup of the Municipal Court of the District of Columbia into its presently existing form, also providing for an intermediate appellate tribunal to be known as the Municipal Court of Appeals, between the Municipal Court and the United States Court of Appeals for the District of Columbia. In all of its provisions, the Congress was careful to specify only the limited additions it was making to the inferior tribunals, first in making it a court of record, secondly in increasing its jurisdictional amount from $300 to $1,000 and then to $3,000; and thirdly in expanding its personnel and making it a more efficient instrument of justice in the District of Columbia as shown by the Act of April 1, 1942, together with providing an intermediate appellate tribunal to review both interlocutory and final determinations of the Municipal Court. (Previously interlocutory determinations of the Municipal Court could not be reviewed by any tribunal. See *Serkowich* v. *Wardell*, 69 App. D. C. 389, 102 F. (2d) 253.)

It is of the utmost significance that Congress has never provided for life tenure of judges in the Municipal Court in the District of Columbia, but on the contrary has limited their appointments to a term of years only, and also that Congress has seen fit to omit the legislative declaration that these inferior tribunals are courts of the United States, which it has especially made in the case of the District Court and the Court of Appeals for the District of Columbia. (Supra, p. 7.)

Prior holdings of the Court of Appeals for the District of Columbia show that earlier that court also understood the Municipal Court of the District of Columbia *not* to be a court of the United States. Thus, in *W. B. Moses & Son* v. *Hayes*, 36 App. D. C. 194, the court held the Municipal Court of the District of Columbia to be an inferior court and as such it "is a part of the judicial system of the district" (36 App. D. C. at 198). See also *United States* v. *Mills, supra*, pp. 16-18.

The Court of Appeals has previously so held with regard to the Police Court and the Juvenile Court of the District of Columbia, the Police Court having once been one of the branches of the Justice of the Peace Court, then established as a separate court and now again merged into the Justice of the Peace Court which has become the Municipal Court for the District of Columbia by the Act of April 1, 1942. *Cf. Tipp* v. *District of Columbia*, 69 App. D. C. 400, 102 F. (2d) 264, citing and relying on *United States* v. *Mills, supra.*

In *United States* v. *West*, 34 App. D. C. 1, the Juvenile Court of the District of Columbia was held to be "a subordinate inferior tribunal" (34 App. D. C. at 17) and "an inferior court of special, limited jurisdiction". (34 App. D. C. at 18). In that case, the Court of Appeals further said: "the supreme court of the District of Columbia has general common-law jurisdiction of civil and criminal matters * * * There is only one general court of common-

law jurisdiction within the District of Columbia, which is the supreme Court." (34 App. D. C. at 16.) See also *Fidelity Deposit Co.* v. *McQuade*, — App. D. C. —, 123 F. (2d) 337, 339.

Summing up, we believe that the District of Columbia is a locality distinct to itself and has characteristics similar to those of any State of the Union. Certainly, this is true in other than its judicial aspects. See *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 4 *et seq.*, where this Court has said that the Government of the District of Columbia is "strictly municipal in its character", and later, that "the Government of the United States * * * took no part in the local government." Indeed, this Court went on to say that the District of Columbia may be considered a separate State in a limited sense. See 132 U. S. 1, at 9. We believe that these considerations likewise apply to the inferior judicial tribunals of the District of Columbia which are local courts just as much as any State court is. Only the Federal Courts in the District of Columbia are federal in their character, and hence "courts of the United States" in the sense in which we have been discussing these courts. This view is reinforced by the authority of many decisions of this Court. See *O'Donoghue* v. *United States*, 289 U. S. 516, 545 *et seq.*; *Williams* v. *United States*, 289 U. S. 553. Compare *McAllister* v. *United States*, 141 U. S. 174, 180 *et seq.*, where this Court held that a judge of the Alaska Territorial court could be removed from office by the President and spoke accurately of such a judge as "a judge of a court of record created by the United States" (141 U. S. at 193), but not as a judge of a court of the United States. This we believe to be the case with the Municipal Court of the District of Columbia, and we feel that in view of the dubiety apparent on the matter, this Court should grant certiorari and so declare the law.

4. *The meaning of words as interpreted by the law of New York*

In addition to the foregoing, petitioner wishes to prove custom in New York as to separation agreements, and *the meaning of the words* contained in the agreement here sued upon. This is clearly admissible testimony under all the authorities. See *Harrison* v. *Nixon*, 9 Peters (U. S.) 483, 504, per Mr. Justice Story; Story on Conflict of Laws (8th Ed., 1883), pp. 651-652; Restatement of the Conflict of Laws, §214; and authorities and argument collated in the petition for rehearing (R. 130-131). Therefore, it was plain error to exclude expert testimony upon this point, and a verdict based upon this ruling should not be sustained.

The Court of Appeals has held that where there is no proof of the foreign law "the presumption must be indulged either that the rule of the common law or that in force in the District of Columbia prevails". *Howard* v. *Railway Company*, 11 App. D. C. 300, 337. As may be seen from a comparison of the decision of the Court of Appeals in the instant case (R. 113-115) with the decision of the Court of Appeals of New York in the two *Haskell* cases (see Appendix), this is not the case. Hence, in view of further impending litigation in collateral suits in the District Court in this matter, petitioner should be rescued from the false position in which the present decision of the Court of Appeals has placed him.

Point II.

The Court of Appeals plainly misapplied the law of New York; under that law judgment for the petitioner is required in the circumstances disclosed by the record.

The Court of Appeals in its opinion correctly stated that "by the law of New York the custody provision is a material part of the contract, and a breach by the wife without justification will bar recovery by her. *Duryea* v. *Bliven*,

122 New York 567, 25 N. E. 908" (R. 114). However, the Court of Appeals in its ruling and decision then goes on to ignore the remainder of the law of New York on this point. It is to be emphasized that there have been many thousands of decisions upon similar separation agreements in New York, and for that reason particularly petitioner desired to introduce expert testimony in order to show what the law of New York really was.

Before going further with the argument on the law of New York, it may be well to point out the state of the record upon this item. The separation agreement clearly provides that the father is to have the complete custody of the child for two months in each year "at any time designated by him" so long as the mother has not remarried and the child is not eight years old, which is here the case (R. 65). The undisputed evidence which no court has the right to ignore shows that respondent has refused to comply with those custodial provisions. The record shows that respondent has not only refused to turn over the child to petitioner but on March 9, 1941 she explicitly refused a formal oral demand by petitioner's attorney (expressly authorized by petitioner to make this demand) for custody of the child during two months in the summer of 1941 (R. 37). The witness Stammler testified in detail as to what took place in that interview between himself as petitioner's attorney on the one hand, and respondent and her attorney, Mr. Walsh, on the other, (R. 35-36), and although both Mr. Walsh and respondent were present at the trial and both heard part of Stammler's testimony and respondent all of it, *neither took the stand to contradict him as they certainly would have had they disputed his testimony in any particular.*

This refusal to surrender custody of the child is made perfectly clear in the record. As Stammler testified, "The reply to this was the statement by Mrs. Hammond * * *

that in no event would she agree to surrender custody of the child outright to her former husband" (R. 37). Further questioning of Stammler by the Court below brings this point out sharply. The following colloquy later occurs (R. 39):

> "The Court: She refused to let him have the child?
> "The Witness: She did.
> "The Court: That is all I want to know."

There is a great amount of correspondence between Walsh and Stammler both before and after March 9, 1941, showing this consistent refusal to turn over custody of the child on respondent's part. All of this was excluded by the Court below (R. 38-39), but the gist of its contents is clearly brought out in the motion for a new trial denied by the Court below (R. 97-99). If any doubt remained that respondent refused to turn over custody of the child to petitioner it was removed by her letter of August 15, 1941 (R. 101-103) which said *inter alia*: "In any event I want you to know that from the facts which have come to my attention, I would not feel justified as a mother in allowing you complete custody of the child for two months. I shall be glad, however, to allow you to visit Edythe whenever you desire." To this petitioner made reply on August 22, 1941 (R. 103-106), again demanding his full custodial rights.

The Court below ruled that all of this testimony was immaterial. Upon having his attention directed to petitioner's refusal to turn over custody of the child *long before the institution of this action,* the Court remarked:

> "All right. I do not think it is very material" (R. 47).

Proceeding under the separation agreement and treating it as still valid and in effect and seeking to base a recovery and judgment thereon, respondent was not and is not at liberty to disregard her own covenants and obligations

thereunder. The law of New York is perfectly clear upon this point, and the law of New York alone governs here. Respondent admits that the law of New York alone controls (R. 32), and there is a special finding of fact to that effect (R. 90), and the decisions of this Court command application solely of the law of New York (*Atherton* v. *Atherton*, 181 U. S. 155; *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 641; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *A. T. & T. Co.*, 311 U. S. 223; *Moore* v. *Ill. C. R. Co.*, 311 U. S. 643). See also *Shaw* v. *Saxman*, 46 App. D. C. 526, 532.

The pronouncements of the New York Court of Appeals have been clear and uniform on this subject: the refusal of the wife or ex-wife to give over custody of the child as provided in a separation agreement is an absolute bar to her recovery of *any payments under the agreement or otherwise.*

In *Dureyea* v. *Bliven*, 122 N. Y. 567, 25 N. E. 908, the Court of Appeals denied recovery to a wife on this ground saying, "The agreement of the wife * * * to permit the husband to associate with his children was not only valid but was a material part of the contract, which could not be violated by the wife, and a recovery be sustained in her favor, for her benefit, for the sum which he stipulated to pay monthly."

Again in *Haskell* v. *Haskell*, 201 App. Div. 414, 194 N. Y. S. 28, affirmed without opinion, 236 N. Y. 635, 142 N. E. 314, recovery was denied a wife suing under a separation agreement where in violation of the terms of the agreement: "The undisputed evidence is that * * * he was not willing to consent to his leaving her and going to the father" (201 App. Div. at 416). After full discussion the wife was denied *any* recovery because of her violation of the covenant in the agreement "where she had agreed with her husband that he was to have sole charge of the

education of their son, and where he asked for the custody of the child and the right to enjoy his society and discipline him and where he was willing and able to contribute for his support'' (201 App. Div. at 417-418). On appeal this was affirmed by the Court of Appeals.

On later action in the same case *for back sums under the separation agreement* the appellate court again reversed judgment for the wife, saying: ''the question (is) whether under the circumstances the defendant was obliged to pay the plaintiff anything * * * the action of the present plaintiff in harboring the boy when she knew he had refused to attend the school selected by the father was a violation of the terms of the separation agreement between the parties, and, therefore, the defendant was held not to be indebted to the plaintiff, and the complaint was dismissed'' (207 App. Div. at 724). Despite a vigorous dissent this judgment was unanimously affirmed without opinion by the Court of Appeals. The full citation of the controlling second *Haskell* case is 207 App. Div. 723, 202 N. Y. S. 881, affirmed unanimously and without opinion 254 N. Y. 569, 173 N. E. 870.

The *Haskell* cases under the rules laid down by this Court plainly control the decision of the instant case. *Erie Railroad Company* v. *Tompkins, supra.* The facts and law of these cases are examined in detail in the Appendix to this brief, where appropriate portions of the records therein are set out to show that the conclusions that the Court of Appeals in the instant case purported to draw as to the law of New York are false in every particular. See petition for rehearing (R. 124). For reasons that are immaterial the Court of Appeals did not see fit to follow the law of New York as laid down in the *Haskell* cases and we respectfully submit that this Court, applying its rules as announced in recent cases, should compel that court to follow the clear law of New York. We feel that a perusal of the Appendix

will leave no doubt but that every one of the concluding remarks of the Court of Appeals in this case (R. 115) are directly contrary to the law of New York. That law clearly points out that whether the demand for custody of the child is made before or after the husband is in default, a refusal to comply with custodial demand excuses the husband from further payments under the separation agreement.

Surrogate Foley of New York County (a well known authority on New York law) only last year disposed of a claim identical with appellee's here, denying the ex-wife plaintiff there recovery because of her refusal to permit her former husband to visit his daughter, saying: "the wife, by her refusal both before *and after* the pendency of the habeas corpus proceeding, breached the separation agreement in a material and important phase and thereby the husband was relieved of his obligation to pay the monthly installments."

"A parallel case directly in point was considered by the Court of Appeals in *Dureyea* v. *Bliven* (122 N. Y. 567)" (173 Misc. at 845). The learned Surrogate goes on to quote at length from *Dureyea* v. *Bliven* and to apply it, finally saying:

"The rules of law and the conclusions of the Court of Appeals in *Dureyea* v. *Bliven* (*supra*) that the denial of visitation relieved the husband of the duty to support under an agreement or a decree awarding alimony with *conditions* for the right of visitation, have been followed in subsequent authorities. (*Silkworth* v. *Silkworth*, 255 App. Div. 226; *Ambrose* v. *Kraus*, 256 App. Div. 933; *Swanton* v. *Curley*, 273 N. Y. 325; *Harris* v. *Harris*, 197 App. Div. 646" (173 Misc. at 848). *Matter of Noel*, 173 Misc. 844, 19 *N. Y. S.* (2nd) 370, per Surrogate Foley.

See also *Clayburgh* v. *Clayburgh*, 261 N. Y. 464, 185 N. E. 701; *Muth* v. *Wuest*, 76 App. Div. 322, 78 N. Y. S. 431; *Harris* v. *Harris*, 197 App. Div. 646, 189 N. Y. S. 215.

Furthermore, the law of New York in this particular—that is, holding that a denial of custody by the former wife relieves the former husband of any duty to continue separation agreement payments *whenever* such refusal by the former wife may take place—is in complete accord with the generally prevailing law of the United States on this point. The leading cases, in addition to the New York cases cited just above, are:

Heinsohn v. *Chandler*, 2 Atl. (2nd) 120 (Del. Ch. 1935);
Barnaby v. *Barnaby*, 290 Mich. 335, 287 N. W. 535;
Myers v. *Myers*, 143 Mich. 32, 106 N. W. 402;
Myers v. *Myers*, 161 Mich. 487, 126 N. W. 841;
Cole v. *Addison*, 153 Or. 688, 58 P. (2nd) 1013;
Stratton v. *Stratton*, 67 S. D. 354, 293 N. W. 183 (1940).

See Annotation 105 A. L. R. 901 *et seq.*

As the Oregon Supreme Court well summed up the situation in *Cole* v. *Addison*, *supra*:

> "In other words, he performed, and, when it became her duty to perform, she refused, and this excused him from any further performance upon his part." (153 Or. at 692-693.)

The facts of the instant case cause the remarks of the Supreme Court of South Dakota in *Stratton* v. *Stratton*, *supra*, to become particularly applicable here:

> "The agreement of the parties was that respondent was to pay appellant certain sums of money as alimony and in consideration therefor appellant was to permit respondent to occasionally enjoy the society of his little child. This she steadfastly refused to do and for no reason in the world except pure malice.
>
> "Appellant is not in court with clean hands and the court will leave her where it finds her. The Supreme Court of Minnesota recently reached the same result in a similar case. *Anderson* v. *Anderson*, Minn., 291 N. W. 508." (293 N. W., at 184-185.)

For further discussion, see petition for rehearing (R. 122-126).

POINT III.

Various other errors committed by the lower courts herein call for the exercise of the supervisory power of this Court in the circumstances of this case.

Respondent rested her case at the end of the first 10 pages of the transcript (Tr. 17-27; R. 20-29), having put on merely formal proof of the agreement and the payments and having discussed the one disputed item of one $100.00 payment already mentioned in the statement of the case. No word whatever was put in by respondent with reference to any breach of the separation agreement by petitioner. No claim has ever been made that he was late in any payment to respondent. Later in the case (R. 31) counsel for respondent contended that petitioner breached the contract but never put on any witness to prove it and never proved it by cross examination. The *verbatim* transcript (Tr. 17-74; R. 20-62) may be read from end to end, as indeed it has been carefully read by us, and not one word will be found from any witness and, in fact, from no one except claims made by Mr. Schein, respondent's counsel, *not testifying*, that petitioner had defaulted under the contract by not furnishing sworn income statements by the 10th of January in each year. As a matter of fact, petitioner had furnished respondent with certified copies of his income tax reports for the years 1938, 1939 and 1940, and these were actually used by respondent's counsel as the source of the income figures in the complaint. This was done *by a written arrangement* between the two attorneys, Walsh for respondent, and Stammler for petitioner (R. 97-98), all excluded by the lower court.

However, the persistence of Mr. Schein eventually wore down the Municipal Court because apparently that Court

was under the erroneous impression that proof had been made of appellant's default. See R. 51-52, where the Municipal Court said, "I am holding he has no such right under the agreement (*i. e.*, to prove the 1938 payment to appellee) *because he didn't furnish plaintiff with a statement of his income.*" This is an unwarranted assumption for which there is no word of proof in the record. Further the Court went on to shift the burden of proof to appellant ruling it was his duty to show that he had committed no defaults under the agreement (R. 54, 62, 52-53). This is a novel departure in the law of contracts, for which no warrant can be found in the books. All these rulings were affirmed by the Court of Appeals.

There were no defaults by petitioner. It is elementary and well settled law that every man is presumed to live up to his agreements until the contrary is proved. It was obviously a part of respondent's affirmative case to prove petitioner's defaults here if any there were, if his proof is to be barred. *Since none were proved none may be assumed by the Court, and it is clearly reversible error for the Courts below to base a final judgment on an unproved assumption as to petitioner's default and then exclude petitioner's entire case.* But Judge MATTINGLY ruled (R. 52-53): "All you are permitted to prove is that he complied with this provision of the agreement and furnished the plaintiff with statements of his income between certain dates."

The facts concerning the overpayment by petitioner to respondent of Seven Hundred Twenty-two and 01/100 Dollars ($722.01) in the year 1938 are set forth in detail in Defendant's Exhibit 2 for Identification (R. 79-81), excluded by the Court below (R. 42-43), which clearly shows the mathematical computations upon which this figure was reached, and also shows in detail all the payments made for all years through 1940, and their full computation. The

only additional facts not there mentioned is that these 1938 over-payments to respondent were made *at her own request* in petitioner's absence and *without his knowledge or consent* (R. 54-55, 99, Item VIII)—all of these facts were likewise excluded by the Municipal Court. This balance was set forth in the affidavit of defense (R. 14) and has never been denied by anyone at any point. No replication was filed, as should have been done if respondent disputed these figures, and these payments hence stand admitted by the pleadings. That this setoff should be allowed is clearly demonstrated by the course of accounting under a separation agreement similar to the one here in suit, approved by this Court in *Walker* v. *Walker*, 9 Wall (U. S.) 743.

The Court of Appeals in its opinion denied none of these facts, but chose to rest its affirmance upon another assumption (and an equally vicious one) to the effect that these payments were made under a mistake of law. This is a demonstrable mathematical error under Defts. Exhibit 6, for identification. Even worse, the Court of Appeals' opinion is based on consideration by that Court of evidence excluded below and considered above solely to affirm judgment against petitioner. *It is clear that the over-payment here was made, not under a mistake of law, but solely under a mistake of fact.* The argument on this point is fully set forth in the petition for rehearing (R. 119-121).

In all earnestness we can conceive of no greater injustice than has been perpetrated by the courts below in basing a final judgment permitting a double recovery by respondent of money admittedly already paid her *on an unproved assumption.* We respectfully submit to this Court, both as a matter of simple justice to the parties involved and as a matter of public concern in having a fair trial in future cases in the Municipal Court, or in any other tribunal of the District of Columbia, that this course of accounting

even in small sums of money should not be condoned or sanctioned.

There are other errors in the conduct of the trial below which have been fully assigned, but limitations of space prevent our consideration of these in this petition. Many of them are considered or touched upon in the petition for rehearing (R. 117-136), and we respectfully request the careful consideration of that petition by this Court. That petition likewise examines point by point the opinion of the Court of Appeals and shows its errors and omissions. Especially is it noteworthy that respondent has secured this judgment below in her favor *for a double recovery* in the instant case and a prejudgment in the future case in the District Court, while holding on to valuable furniture (petitioner's property) worth many times the amount of this judgment (R. 135-136), all contrary to the specific terms of the separation agreement. Final judgment for respondent herein would be a most remarkable act of injustice.

Conclusion.

WHEREFORE, we respectfully pray that the petition for a writ of certiorari herein be granted.

Respectfully submitted,

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